Supreme Court, U.S.
FILED
DEC 10 2002

No. 02-747

IN THE

Supreme Court of the United States

BRIAN MARTIN, Individually and as the Administrator of the Estate of Norma Martin, deceased,

Petitioner,

v.

ARKANSAS BLUE CROSS AND BLUE SHIELD, a Mutual Insurance Company,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

DAVID R. MATTHEWS
MATTHEWS, CAMPBELL, RHOADS, MCCLURE, THOMPSON & FRYAUF, P.A.
Attorneys for Respondent
119 South Second Street
Rogers, Arkansas 72756
(479) 636-0875

177834

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

What should be the standard for resolving applications for attorney fees in cases arising under the Employee Retirement Income Security Act of 1974 ("ERISA")?

Respondent respectfully requests that the Court deny the Petition for Writ of Certiorari. The decision of the lower court brought the Eighth Circuit into line with the majority of the other circuits in establishing the applicable law for ERISA attorney fee applications in the Eighth Circuit. That holding is squarely in accord with the holding in seven of the circuits and does not conflict with any other circuit. There is no Supreme Court precedent on the issue.

STATEMENT OF THE CASE

Norma Martin asked Arkansas Blue Cross and Blue Shield to certify benefits for a lung transplant pursuant to an ERISA employee welfare benefit plan in which she participated. After the plan denied the benefits Martin sued, alleging that benefits had been wrongfully denied.

The district court held that a procedural irregularity rendered the plan's denial unreasonable and ordered the plan to certify coverage for the lung transplant. Martin petitioned for attorney's fees, and asked for a contingent fee based on the cost of the lung transplant surgery. The district court denied the petition for fees, relying upon the five-factor test set forth in *Lawrence v. Westerhaus*, 749 F.2d 494, 495-96 (8th Cir. 1984), and determined that the factors weighed in favor of the plan. The district court acknowledged that *Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344, 1356 (8th Cir. 1980) created a presumption in favor of awarding fees absent special circumstances, but concluded that consideration of the *Lawrence* factors led the court to deny attorney's fees. Martin filed a Motion for Reconsideration setting forth an hourly fee request. When that petition for reconsideration was denied, Martin brought the appeal to the Eighth Circuit.

In an en banc ruling, the Eighth Circuit reversed *Landro*, and expressly rejected the presumption of attorney's fees for prevailing attorneys in ERISA cases.

REASONS FOR DENYING THE PETITION

Petitioner urges the Court to adopt a presumption in favor of prevailing plaintiffs in all ERISA cases. He suggests that there is an "irreconcilable split" in the decisions of the circuits regarding the presumption. There is actually no split, irreconcilable or otherwise. In fact, no circuit has adopted the position urged by Petitioner.

The First, Third, Fourth, Fifth, Sixth, Eleventh, D.C., and now Eighth circuits have all considered and rejected the presumption urged by Petitioner. *Cottrill v. Sparrow, Johnson & Ursillo, Inc.*, 100 F.3d 220 (1st Cir. 1996); *Eddy v. Colonial Life Ins. Co. of Am.*, 59 F.3d 201 (D.C. Cir. 1995); *Quesinberry v. Life Ins. Co. of N. Am.*, 987 F.2d 1017 (4th Cir. 1993); *Ellison v. Shenango Inc. Pension Bd.*, 956 F.2d 1268, 1274 (3rd Cir. 1992); *Armistead v. Vernitrop Corp.*, 944 F.2d 1287, 1302 (6th Cir. 1991); *Iron Workers Local No. 272 v. Bowen*, 624 F.2d 1255, 1266 (5th Cir. 1980); *Martin v. Blue Cross and Blue Shield*, 299 F.3d 966 (8th Cir. 2002).

The Second and Tenth circuits do not use the presumption, although they have not considered and expressly rejected the presumption. *See Chambless v. Masters, Mates & Pilots Pension Plan*, 815 F.2d 869, 871 (2d Cir. 1987); *Gordon v. United States Steel Corp.*, 724 F.2d 106, 109 (10th Cir. 1983).

It is true that the Seventh and Ninth circuits utilize a presumption in conducting the ERISA attorney's fee application. However, they use the presumption with a version of the five-factor test utilized by other circuits. *McElwaine v. U.S. West, Inc.*, 176 F.3d 1167, 1172 (9th Cir. 1999) and *Little v. Cox's Supermarkets*, 71 F.3d 637, 644 (7th Cir. 1995).

It is important to note that no circuit applies exclusively the presumption urged by Petitioner herein.

Petitioner suggests that *Gonzales v. Transfer Technologies, Inc.*, 301 F.3d 608 (7th Cir. 2002) supports his position that a decision not to appeal is not a sufficient reason to deny attorney's fees. Petitioner suggests that is the only consideration for the denial of fees by the court in the instant case. He is factually wrong in that regard. In the instant case, the court considered the general guidelines which provide direction to the district court but also facilitate a meaningful appellate review. The court acknowledged that Blue Cross and Blue Shield fully cooperated in the review of Mrs. Martin's denial by expediting the exhaustion of plan administrative remedies, by presenting a stipulated record to the district court, by agreeing to a simultaneous briefing schedule, and, finally (but not singularly), by not appealing the district court's adverse ruling. As the court pointed out, the Respondent immediately complied with the district court's mandate and certified coverage resulting in Norma Martin's lung being transplanted within six months after her case was first filed. The court also noted that Martin would not have prevailed but for a procedural irregularity in the plan's decision making process.

Although this Court has not specifically addressed the applicable standard for awarding attorney's fees in ERISA cases, it has construed a similar statute, the Copyright Act's fee-shifting provision, 17 U.S.C. § 505, in *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 533 (1994). The ruling in *Fogerty* has clear application to the analogous ERISA matters and makes specific review of the ERISA fee-shifting provisions unnecessary.

Finally, Petitioner suggests that failure to adopt a presumption standard will dissuade attorneys from taking ERISA cases. However, Petitioner admitted at the en banc oral argument that few, if any, fee awards have been denied a prevailing plaintiff in ERISA cases nationwide. This is so even though nine of the circuit courts of appeals do not employ any kind of presumption in favor of fees. The Petitioner's fears do not appear founded in fact.

CONCLUSION

Because the decision of the Eighth Circuit Court of Appeals in the case at bar does not conflict with the decision of another United States court of appeals and does not depart from the accepted and usual course of judicial proceedings and does not conflict with relevant decisions of this Court, no certiorari review is warranted.

Respectfully submitted,

DAVID R. MATTHEWS
MATTHEWS, CAMPBELL,
RHOADS, MCCLURE,
THOMPSON & FRYAUF, P.A.
Attorneys for Respondent
119 South Second Street
Rogers, Arkansas 72756
(479) 636-0875